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No. 94-1462

In the Supreme Court of the United States

OCTOBER TERM, 1994

LUCAS P. BAEZ, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, LEGAL ACTION CENTER OF THE AMERICAN IMMIGRATION LAW FOUNDATION, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND TRAVELERS AND IMMIGRANTS AID IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held, in conflict with rulings of the Third, Sixth, Eighth and Ninth Circuits, that Section 106(c) of the Immigration and Nationality Act precludes judicial review of final orders of deportation after an alien has been deported, even if the deportation was illegally executed and/or violated the alien's rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. If so, whether Congress constitutionally can preclude judicial review of final agency adjudications to consider claims asserting colorable violations of the Due Process Clause of the Fifth Amendment to the United States Constitution.

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Marrero v. INS, 990 F.2d 772 (3d Cir. 1993) 13

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8 U.S.C. § 1105a . . . . . *passim*

Miscellaneous:

T. Alenikoff & D. Martin, *Immigration: Process and Policy* (2d ed. 1991) 19

The Federalist No. 32 (J. Cook ed. 1961) 17

Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984) 14

H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2950 . . . . . 6, 14, 18

Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430 (1991) 17

Martin, *Mandel, Cheng Fan Kwok, and Other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 VA. INT'L L.J. 803 (1987) 18

Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) 13

Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990) 14

Torres, *Gaining Relief Under Section 212(c): Disparate Results Based on Geographic Location*, 8 GEOG. IMMIG. L.J. 253 (1994) 17

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INTERESTS OF THE AMICI CURIAE

Amicus American Immigration Lawyers Association is a national association of lawyers and law school professors who practice and teach in the fields of immigration and nationality law.[1] AILA has as its objectives to advance the administration of law pertaining to immigration, nationality and naturalization, to cultivate the jurisprudence and promote reforms of the immigration laws, and to facilitate the administration of justice and elevate the standard of integrity,

[1] Letters from counsel for the parties, consenting to the submission of this brief, have been filed with the Clerk of the Court.

honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

Amicus Legal Action Center of the American Immigration Law Foundation is a non-profit advocacy and litigation program of AILF, an immigration bar foundation. The mission of the AILF Legal Action Center is to represent the public interest in the fair and just administration of immigration and nationality laws and related laws and policies in order to ensure fundamental fairness and due process for immigrants and refugees.

Amicus Mexican American Legal Defense And Educational Fund (MALDEF) is a national nonprofit advocacy organization working to promote the civil rights of Hispanics in the areas of immigration, education, employment and political rights. MALDEF has a direct and substantial interest in the resolution of the questions presented in this case, and in ensuring that deportation proceedings are carried out in a fair and lawful fashion. The ruling of the court of appeals in this case, like those of other courts, represent a serious threat to the civil rights of Hispanics and other immigrant groups who now are faced with the possibility of being deprived of access to judicial review to guard against illegal deportations that are carried out in violation of their civil rights.

Travelers And Immigrants Aid is a 107-year-old not-for-profit social service agency which, among other things, provides legal representation to low-income immigrants through its Midwest Immigrant Rights Center (MIRC). Through its staff of three attorneys and eight Justice Department Accredited Representatives, and a *pro bono* panel of 160 volunteer attorneys, MIRC represents more than 2,000 immigrants a year, including approximately 200 persons a year in deportation proceedings, many of whom are directly affected by the questions presented in this case.

The Petition before this Court raises fundamental questions of great concern to *amici* regarding the rule of law in the immigration field and the preservation of constitutional safeguards to those who are subject to the immigration laws. The questions presented in this case provide a long-awaited opportunity for this Court to resolve the uncertainty over the availability of post-deportation judicial review,

particularly in cases where deportation has been carried out illegally in violation of aliens' rights to counsel and to due process. *Amici* have a direct and serious interest in assisting in the development of this body of law, in eliminating the confusion faced by practitioners and courts who seek to ascertain and apply the pertinent law, and in overcoming the prejudice suffered by both represented and unrepresented non-citizens denied access to judicial review, effective advice of counsel, and due process. *Amici's* familiarity with the administration of justice in the immigration field lead them to believe that this Court would benefit from consideration of their views as to the compelling reasons supporting review in this case.

STATEMENT

The Statue of Liberty is more than a notable sculpture; it symbolizes the promise of America. That promise is reflected in the varying hopes and dreams of the individual immigrants and refugees who come to our shores. A common thread tying together all those aspirations is the shared confidence that principles of fairness and due process prevail in this country. From the time the framers of the Constitution responded to the arbitrariness of unbridled colonial officials by setting up an innovative system of governance, the United States has been guided by the collective judgment that no branch of government should be granted the unreviewable authority to act without the checks and balances that were carefully designed to guard against arbitrary action.

In this case, the decision of the Court of Appeals for the First Circuit raises serious and far-reaching statutory and constitutional questions which challenge the durability of that guarantee. In effect, the court holds that the statutory and constitutional rights of aliens are not subject to the words of Congress or the rulings of the courts, but instead, ultimately are controlled by the Immigration and Naturalization Service which may abrogate those rights without judicial oversight. The First Circuit's opinion is of great concern to immigrants, immigration practitioners and scholars alike because of the confusion it creates as to the meaning of Section 106(c) of the Immigration and Nationality Act ("INA") and the availability of judicial review under the INA. Under its holding in this case, an alien who is involuntarily

deported forever loses the right to challenge the order of deportation in court no matter the merits of the INS' decision, and whether or not that deportation was illegal or in violation of the alien's constitutional rights. That is not, and *cannot*, be the law.

The lack of uniformity among the courts of appeal on this very important question has created problems of legal and human proportion, not only for aliens, many of whom are unrepresented, but for immigration lawyers who must advise immigrants of their rights under the law and ensure that those rights are protected to the fullest measure. The instant decision of the court of appeals also is of great concern because it provides an alien with no recourse whatsoever should the alien be deported in violation of his right to counsel or his constitutional right to due process. Rather than read Section 106 to allow aliens the opportunity provided them by the statute to consider the availability *and advisability* of judicial review, the court of appeals' decision makes clear that the only way to ensure access to judicial review is by winning the race to the courthouse to obtain either the automatic or discretionary stay of deportation that becomes available upon filing of a petition for review (assuming that the alien even made aware of the entry of the final order in a timely fashion in the first place). Such a consequence not only unacceptably and needlessly disregards aliens' rights, but frustrates the government's legitimate interests in law enforcement and timely and lawful removal of aliens subject to final orders of deportation as well.

In short, the questions presented in this case are of vital significance to the daily administration of justice under the immigration laws. As *amici* can readily confirm, the confusion over these issues continues only to grow and worsen. This case provides an ideal opportunity for this Court to resolve these important statutory and constitutional questions, and we urge this Court to grant review.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO AFFIRM THE STATUTORY AVAILABILITY OF JUDICIAL REVIEW OF A DEPORTATION UNDER SECTION 106 AFTER AN INVOLUNTARY REMOVAL

Section 106 of the INA provides for exclusive review of final deportation orders in the courts of appeals. To obtain such review, an alien is granted 90 days from the issuance of the final order (30 days in the case of an alien convicted of an aggravated felony) to file a petition for review as long as the alien has exhausted his administrative remedies and has not "departed" from the United States. 8 U.S.C. § 1105a(a),(c). The First Circuit's ruling, however, casts into serious doubt the availability of this period for seeking judicial review by granting to the INS the unfettered authority to cut off the alien's right to judicial review by simply carrying out the order—even by clearly illegal and unconstitutional means.

Since the Ninth Circuit's decision in *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977), the courts have been unable to reach a consensus over the availability of judicial review under Section 106(c). This state of affairs: whether an alien in fact has any time under Section 106(a)(1) to decide whether to pursue judicial review, or whether the process of judicial review is simply a race to the courthouse to secure a stay of deportation under Section 106(a)(3) is unacceptable. *Amici* believe that the First Circuit's opinion in this case is erroneous and contrary to the statute's own terms. The questions presented transcend far beyond the specific merits or confines of this case alone, and warrant specific guidance from the Court.

A. Confusion Over The Meaning And Effect of Section 106(c) Has Resulted In Disparate Access To Judicial Review In Immigration Cases

The judicial review procedures in Section 106 were designed to promote the efficient disposition of deportation orders and a fair opportunity for aliens to challenge them. As then Deputy Attorney General Byron White explained in support of the statute, "[a]liens seeking review of administrative orders should be given full and fair

opportunity to do so." H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2950, 2968. The House Report emphasized that providing an opportunity for review in the court of appeals would give an alien "greater rights, greater security, and more assurance of a close study of his case by experienced judges." *Id.* at 2972.

This Court has "repeatedly acknowledged 'the strong presumption that Congress intends judicial review of administrative action.'" *Traynor v. Turnage*, 485 U.S. 535, 542 (1988), quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 683 n.12 (1986).[2] This presumption may be rebutted only upon a showing of "clear and convincing evidence." *Reno v. Catholic Social Servs.*, 113 S. Ct. 2485, 2499 (1993). Where the review sought is of a "colorable constitutional claim," the government also bears the burden of making a "heightened showing" of preclusive intent on the part of Congress. *Webster v. Doe*, 486 U.S. 592 (1988). For this reason, apparently, many courts properly have refused to construe Section 106(c) as precluding judicial review of colorable constitutional claims. See Pet. at 9-10, 14-15.

The First Circuit's interpretation of Section 106(c) is tantamount to an outright denial of judicial review for otherwise eligible appellants. Such preclusion of judicial review is clearly at odds with the well-settled presumption favoring such review. *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991) (interpretation of statutes should be subject to judicial review); *Superintendent v. Hill*, 472 U.S. 445, 449 (1985) (review of agency decisions implicating protected liberty or property interests may be required by the Constitution). By reading Section 106(c) to grant the INS absolute power to thwart an alien's right to judicial review under Section 106(a), the First Circuit and its predecessors have thrown the entire

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[2] This presumption of reviewability is not a creation of the judiciary, but was inscribed by Congress in the Administrative Procedure Act. Sections 701 and 702 of the APA, for example, state that a person aggrieved by agency action is "entitled" to judicial review unless the relevant statute precludes it.

scheme of judicial review under the INA into chaos, making it virtually impossible for those who must apply the statute on a daily basis to do so with any measure of confidence.

In its decision in *Stone v. INS*, 115 S. Ct. 1537 (1995), this Court addressed the consolidation of petitions for review of final orders with those for review of motions under Section 106(a)(6), and in doing so affirmed unequivocally that Congress intended in Section 106 to provide a right of judicial review. In reinforcing the need for preserving judicial review, this Court expressed concern with the interpretation advanced by the petitioner in that case that a motion to reconsider should be treated as having the usual tolling effect on the period for seeking review.[3] Given the unique circumstances of an appellant facing a final order of deportation, seeking agency reconsideration would have created for such an alien a "Hobson's choice": to petition for review of a final deportation order to obtain a stay, or to seek agency reconsideration and face the risk of immediate deportation. 115 S. Ct. at 1546.

Such an untenable "choice" is of course, distinct, but is still similar to the "Hobson's choice" facing aliens who seek to avail themselves of the time period provided by Section 106 for deciding whether or not to appeal—since waiting would likewise expose aliens (under the First Circuit's reading of the statute) to the risk of immediate deportation and the loss of judicial review. Indeed, to interpret Section 106(c) as allowing the INS to frustrate an alien's access to judicial review by deporting him not only departs from traditional rules of construction, but as a practical matter encourages a perhaps unnecessary increase of the federal judicial dockets. For the lucky, the First Circuit's reading of the statute will cause aliens to err on the side of filing a petition for review immediately upon

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[3] In *Stone*, the majority opinion noted without deciding that "[o]nce an alien has been deported, the courts lack jurisdiction to review the deportation order's validity." 115 S. Ct. at 1546. There is no suggestion, however, that this Court intended to decide the question presented in this case. Not only was this issue not briefed by the parties in *Stone*, but a contrary holding in this case would in no way conflict with the decision in *Stone*.

receipt of a final order, purely to avoid that right from being extinguished before a reasoned determination can be made whether to appeal. For the unlucky, the court of appeals' holding is tantamount to issuing INS a license, notwithstanding the alien's right to counsel and due process, to "arrest" with a single apprehension both the alien and his right to judicial review. Such a result would serve no legitimate purpose.

B. The Plain Meaning of Section 106(c) Can Be Resolved By Giving Uniform Effect to The Relevant Terms In The Context of The INA

On its face, Section 106 uses the term "departed", a term of art in immigration law and policy that connotes a knowing and voluntary departure from the United States by the alien. Contrary to the assumption of the court of appeals (Pet. App. 11c), the term "depart" is readily distinguishable from other terms in the statute that reflect an *involuntary* removal from the United States for a foreign or native land, such as "deportation", "expulsion", and "removal".[4]

Courts *always* should avoid construing a statutory provision so as to "completely nullify a procedure so intrinsic a part of the legislative scheme." *Costello v. INS*, 376 U.S. 120, 127-128 (1964). See Pet. at 17-19. In this case, however, it appears that there was no consideration of the statutory scheme at all. Nor does it seem that even a dictionary comparison was made with the word "deport" or "deportation", which would have revealed that term "depart" or "departure" typically refers to an act of volition, or something one

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[4] For example, non-citizens holding certain nonimmigrant statuses under Section 214 routinely depart and re-enter the United States using visas designated for such purposes; they have not been "deported". Others, including lawful permanent resident aliens, depart and return without even being found to have made a *meaningful departure*: they have not been deported. See Section 101(a)(13), which uses the term "departure" and differentiates it explicitly from "deportation". The concept and term is applied with recurring frequency to aliens not yet lawfully admitted but eligible for status under various provisions of the INA. See, e.g., *Castrejon-Garcia v. INS*, 49 F.3d 603 (9th Cir. 1995).

does himself, while "deport" or "deportation" generally is something done *to* the individual by someone else.

The message sent by the court of appeals in this case is that the guarantee of judicial review in Section 106 is either an arbitrary or illusory one, available only to those who can get to the courthouse and serve the INS without getting caught and deported by the INS first.[5] According to the First Circuit, it would be within the power of the INS and not Congress or the courts, to determine whether an alien has access to judicial review simply by arresting and deporting him before he has a chance to seek judicial review or even to consult with counsel. This is neither a rational or permissible interpretation of the language of Section 106(c), nor does it further the intent of Congress.[6] A statutory provision intended to benefit the alien, *i.e.*, by conferring upon him a right to judicial review, should not be construed so as to penalize him.[7] There is no support in the statute either for such an interpretation or its practical impact.

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[5] The "vagaries" of timely service on both the INS and the alien (or his counsel) are significant since INS has the benefit of internal governmental access to decisions of the BIA, while the alien must rely upon that agency's proper and accurate record keeping, as well as the reliability of the United States mail to receive notice of a final order of deportation in time to petition for review. The court of appeals' holding hardly serves to level the playing field. See Pet. at 13-15. Indeed, no amount of rarified vocabulary or gratuitous commentary by the First Circuit concerning the quality of the U.S. Mail (Pet. App. 13a), can contradict the fact that such fundamental procedural guarantees as notice and an opportunity to respond constitute the cornerstone of our understanding of due process in this country. *Plyler v. Doe*, 457 U.S. 202 (1982); *Bridges v. Wixon*, 326 U.S. 135 (1945).

[6] Courts generally are bound to defer to an agency's determination of a term within its statutory meaning, unless the interpretation clearly is contrary to the sense intended by Congress, as is the case here. *Chemical Manufacturers Assn. v. NRDC*, 470 U.S. 116, 125 (1985).

[7] *Castrejon-Garcia, supra* (when more than one definition for a statutory term exists the one which effectuates the intent of Congress is to be given effect).

In *amici's* view, consistent with that of the petitioner, the term "departed" in Section 106(c) reasonably can be read only to preclude judicial review in cases where an alien has actually departed the United States voluntarily (i.e., with a knowing understanding and waiver of the legal consequences) after the issuance of a final deportation order.[8] This reading, as distinct from the more painful construction adopted by the court of appeals below, gives full effect to the distinctions drawn in the INA between "deportations" and "departures". It also is most consistent with the clear purpose of Section 106(c), *i.e.*, to set forth circumstances in which an alien may waive the right to judicial review by failing to comply with the section's timeliness, exhaustion, and non-departure requirements.

By extending the reach of Section 106(c) to involuntary removals, the effect of the court of appeals' decision allows INS unilaterally to shorten the 90-day window for seeking judicial review—*to as little as one day*—and thus forces an alien to involuntarily "waive" his rights. That cannot be the law. This Court has rejected the contention that an alien having no intent to "depart" nonetheless makes an "entry" upon return to the United States causing him, effectively, to waive the protections due him as a permanent resident, *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963), just as it has declared it "irrational" to hold that an alien "taken" to a foreign land had left voluntarily. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). The First Circuit's holding that an alien's unintended, forced departure waives his or her right to judicial review is similarly irrational.

The interpretation advanced by *amici*, on the other hand, would not necessarily prolong an alien's stay in the United States, as it would allow post-deportation review. Indeed, recent amendments to Section 106(a)(3) provide in some cases for an automatic stay upon

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[8] Of course, such a waiver must be knowing. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (waiver of statutory rights must be "voluntary and knowing"). See also, Section 242A(b)(3); Sec. 130004, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, as amended effective September 13, 1994 (waiver of appeal period must be knowing and voluntary).

filing a petition for review and serving the appropriate official, while allowing deportation even during the period of judicial review.[9]

In any event, even if the statute were read to preclude judicial review in cases of involuntary deportations, it is still apparent that the First Circuit's decision cannot be left to stand since INS action which results in deportation without proper and adequate notice to counsel and an opportunity for judicial review before an alien is exiled from his family, business and community is clearly unconstitutional.[10] Indeed, four circuits have properly recognized that whatever the statute's purpose, it cannot be interpreted to preclude judicial review of claims that a deportation has been carried out illegally.

The split in the circuits over the meaning of Section 106(c) and the availability of post-deportation judicial review is intolerable, and has seriously hindered the fair and consistent administration of justice under the immigration laws. *Amici* therefore strongly urge this Court to grant review and resolve this issue once and for all.

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[9] Limitations on access to judicial review for those convicted of an aggravated felony, by narrowing of the length of the appeal period, were imposed by Sec. 7347(b) of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, eff. Nov. 18, 1988, amended by Sec. 501 of the Immigration Act of 1990 (Immact 90). eff. Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978, applicable (with regard to the appeal period) to final orders of deportation issued on or after January 1, 1991. In terms of lifting the automatic stay upon filing a petition for review, limitations also were imposed by Sec. 513 of Immact 90, applicable to petitions for review filed more than 60 days following the date of enactment (January 28, 1991).

[10] While still classified as civil in nature, deportation has been said by this Court to constitute "the equivalent of punishment" *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1947); "a sentence to a life in exile" *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (J. Jackson dissenting); "an event that results in loss of property or life or all that makes life worthwhile" *Ng Fung Ho v. White*, 259 U.S. 276 (1922). See also *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir 1994) (little is more drastic than expelling persons - even those convicted of an aggravated felony - when their family members are residents of this country).

II. THE COURT OF APPEALS' DECISION LEAVES ALIENS WITHOUT ACCESS TO JUDICIAL REVIEW FOR VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS

Over the past 100 years, this Court often has recognized the rights of aliens under the Fifth Amendment to due process and the assistance of counsel. These rights are cherished indeed, for it is a disturbing reality that those rights are often ignored by the INS in its zeal to "remove" aliens from the United States as quickly as possible. Indeed, *Amici's* membership report that it is not an uncommon occurrence for INS agents to deport aliens without notice to their counsel or regard to due process. The court of appeals' reading of Section 106(c) leaves aliens in such cases without any hope or recourse. If the statute must be read in this fashion, it is clearly cannot pass constitutional muster.

A. Failure To Provide A Judicial Forum For Constitutional Claims Deprives an Alien Of Liberty Without Due Process Of Law

The Fifth Amendment guarantees that persons not be deprived of liberty without due process of law. A permanent resident alien is entitled to that protection. See *Landon v. Plasencia*, 459 U.S. 21, 25-26 (1982) (recognizing greater protections available to permanent residents than to illegal aliens); *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1991) (ties and obligations "give the permanent resident alien a stake in the United States substantial enough to command the protection of due process"). Indeed, an alien's recognized liberty interest in remaining in the United States is of the highest order, and one which the Constitution protects against erroneous deprivation. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).[11]

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[11] In *Landon*, 459 U.S. at 34, this Court explained that the right to a given procedural safeguard depends on "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures." See also *Kwong Hai Chew v. Golding*, 344 U.S. 590, 602-03 (1953), cited in *Landon*, 459 U.S.

The right of aliens to counsel and to fundamental fairness in immigration proceedings is not only statutory, but of constitutional magnitude. *Jean v. Nelson*, 727 F.2d 957, 983-84 (en banc) (11th Cir. 1984), aff'd on other grounds, 472 U.S. 846 (1984) (First Amendment and due process right to counsel extends even to excludable aliens who have far fewer due process rights than aliens subject to deportation proceedings). Most courts of appeal thus have readily acknowledged the prejudice that flows from denial of counsel to an alien facing deportation. *Baires v. INS*, 856 F.2d 89, 91 n. 2 (9th Cir. 1988) (right to counsel "fundamental" and not to be treated casually by INS); *Cheung v. INS*, 418 F.2d 460 (D.C. Cir. 1979) (denial of right to obtain counsel inherently prejudicial); *Castenada-Delgado v. INS*, 525 F.2d 1195 (7th Cir. 1975) (denial of continuance to obtain counsel violates due process). Failure to notify and inform counsel has been held to violate due process. *Camacho-Bordes v. INS*, 33 F.3d 26, 28 (8th Cir. 1994); *Marrero v. INS*, 990 F.2d 772, 777 (3d Cir. 1993) (failure to serve attorney violates due process). In addition, an inadequate opportunity to assert appellate rights before the agency violates due process protections guaranteed in deportation proceedings. *Gonzalez-Julio v. INS*, 34 F.3d 820, 925 (9th Cir. 1994) (10 days to file agency appeal unreasonable compared to petitioner's substantial interest and risk of erroneous deprivation).

Even those circuit courts that have rejected *Mendez* have acknowledged the right to counsel in deportation proceedings, thus creating an illogical and unnecessary conflict within their own courts between the right to counsel generally and the potential denial of the right to counsel when it comes to accessing judicial review under Section 106(c). *United States v. Campos-Ascencio*, 822 F.2d 506 (5th Cir. 1987) (denial of counsel violates Fifth Amendment); *Waldron v.*

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at 33 ("Although the holding [in *Chew*] was one of regulatory interpretation, the rationale was one of constitutional law."); *Woodby v. INS*, 385 U.S. 276, 284-85 (1966) (Court addressed its awareness of the drastic deprivations caused when a resident is forced to forsake all his ties to this country and go to a foreign land). See also generally, Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

INS, 984 F.2d 71 (2d Cir. 1993) (failure to advise counsel of decision); *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991) (no intelligent waiver of right when alien not informed).

The court of appeals in this case, however, refused to recognize that a day in court *is* the "process" that is "due" under the Constitution, basing its view on Congress's Article III power to withhold jurisdiction from lower federal courts. Pet. App. 12a n.7. *Amici* respectfully submit that the court of appeals' constitutional analysis is flawed for a number of reasons. First, it ignores the fact that the Due Process Clause of the Fifth Amendment *amended* the original Constitution and thus necessarily limits Article III. See Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1648 (1990). Second, it ignores the teaching of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that whether there is a constitutional right to judicial review is a question for the judiciary—not Congress or the executive branch—to decide. And third, it ignores the hollowness of a constitutional right enforceable only by the same executive agency accused of violating it.

To the contrary, President Eisenhower, who signed the INA into law, told Congress that "Constitutional due process wisely confers upon any alien, whatever the charge, the right to challenge in the courts the Government's finding of deportability." H.R. Rep. No. 1086, 1961 U.S.C.C.A.N. at 2968. Courts and scholars also have long insisted that a total preclusion of judicial review for claims of constitutional rights violations would infringe due process.[12] To hold otherwise would allow INS to issue and execute deportation

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[12] See *e.g.*, Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 n.113 (1984) ("all agree that Congress cannot bar all remedies for enforcing federal constitutional rights"); *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.) ("while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law"), cert. denied, 335 U.S. 887 (1948).

orders in an arbitrary, discriminatory and unconstitutional fashion before aggrieved aliens have a chance to seek judicial review and to challenge the constitutional validity of such deportations. It is hard to imagine that any court would find such a practice consistent with what Americans mean by due process.[13] Fairness undoubtedly mandates that a governmental agency accused of violating constitutional rights not have the final say as to that claim.

A legal alien, especially one with extensive family ties in this country like Petitioner, has an enormous stake in remaining in the United States, as this Court often has acknowledged. The value of judicial review in safeguarding against overzealous action by INS and the illegal or unconstitutional deportation of an immigrant likewise cannot be questioned. Indeed, the government can have no legitimate interest in precluding judicial review in such cases.

The decision of the court of appeals is of crucial constitutional significance to *all* immigrants to the United States, and seriously jeopardizes the ability of immigrants to protect the core procedural safeguards guaranteed them by the constitution. Although *amici* believe that Section 106 can and should be read in such a way as to avoid these constitutional concerns, the court of appeals' reading of the statute, if left undisturbed, unavoidably calls upon the court to resolve these "significant constitutional questions". *Amici* believe that this case provides an important opportunity to do just that, and urge this Court to grant review.

B. It Is Time For This Court To Resolve This "Serious Constitutional Question"

Whether due process requires judicial review of constitutional claims is a question that has been raised many times by this Court. On each occasion, the Court has suggested that judicial review of such claims may indeed be required by the Due Process Clause, but has avoided having to answer the question by finding nonconstitu-

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[13] Due process means many things, but it "centrally concerns the fundamental fairness of governmental activity." *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

tional grounds for review (an outcome that we favor in this case as well). See, *e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Weinberger v. Salfi*, 422 U.S. 749, 762; *Johnson v. Robison*, 415 U.S. 361, 366 (1974).

It is perhaps remarkable that the Court has never had occasion to confront the constitutional necessity of judicial review in cases of administrative action. Yet, this question has continued to confront - both this Court and the lower courts for over six decades without a consistent answer. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring) ("When dealing with constitutional rights * * *, there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it"); *Crowell v. Benson*, 285 U.S. 22, 88 n.54 (1932) (Brandeis, J., dissenting). Certainly, one of the primary functions of this Court is to dispel longstanding confusion or doubts on important questions of law, especially those of constitutional dimension. See *Miranda v. Arizona*, 384 U.S. 436, 490 (1966). Given the fundamental liberty interests at stake in this and other cases, this case provide a crucial opportunity to do just that. Indeed, if left to stand, the court of appeals' decision in this case will provide aliens with no forum at all in which to challenge deportations that are carried out in violation of their constitutional rights.

III. THE QUESTIONS PRESENTED HERE RAISE UNRESOLVED LEGAL ISSUES OF CRITICAL PRACTICAL SIGNIFICANCE TO PRACTITIONERS, ALIENS AND THEIR FAMILIES, AND TO THE JUST ADMINISTRATION OF IMMIGRATION POLICY

As matters now stand, an alien such as petitioner who is issued a deportation order and is illegally deported in violation of his right to due process would be entitled to judicial review of that order in the Third, Sixth, Eighth and Ninth Circuits, but not in the First, Second,

Fifth and Tenth Circuits.[14] Such an outcome is not only arbitrary, but contrary to sensible immigration policy.[15] Of particular concern to *amici*, such conflicting rules perpetuate unsanctioned and lawless conduct on the part of the INS, create needless difficulties in advising and representing clients, mandate the filing of potentially ill-advised petitions for review raising ethical questions, and artificially inflate numbers that affect public policy decisions concerning the administration of justice in immigration matters.

On the one hand, the First Circuit's rule generates, immediately upon issuance of a deportation order, a "Hobson's choice". Either the alien must race to the courthouse in an attempt to petition for judicial review before INS can effect a deportation, or he must risk erroneous deprivation of his interests in judicial review, access to

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[14] In the latter circuits, not only is such an individual deprived of review of the agency's underlying order, but he is without a forum in which to challenge the agency's action in illegally deporting him.

[15] Such an outcome also may run afoul of the Constitution, which (in Art. I, § 8) grants Congress the power to "establish an uniform Rule of Naturalization." Certainly, Congress intended Section 106(c) to be construed and applied uniformly, yet aliens who are subject to deportation orders are accorded differing rights pertaining to judicial review due to the split in the circuits. Alexander Hamilton, supporting the uniformity provision, urged that "if each State had power to prescribe a distinct rule, there could be no uniform rule." The Federalist No. 32, at 201 (J. Cook ed. 1961). That same principle mandates uniform judicial rules be applied among the circuit courts. *Cf.* Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430 (1991) ("it is inconceivable that Congress intended that an alien's excludability should depend on the fortuity of the circuit in which he was apprehended or the circuit in which he was given a hearing"); Torres, *Gaining Relief Under Section 212(c): Disparate Results Based on Geographic Location*, 8 GEO. IMMIG. L.J. 253 (1994) (same). See also Judicial Improvement Act of 1990, P.L. 101-650, 104 Stat. 5089 (requesting Federal Judicial Center to report on unresolved conflicts among the courts of appeals and whether they encourage forum shopping, create unfairness to litigants, and encourage nonacquiescence by federal agencies).

counsel, and other incidents of due process. This situation is sure to result in filings without regard to merit (since aliens will have no time to make an informed judgment after consultation with counsel as to whether judicial review is appropriate). It also will impose a needless burden on already overcrowded judicial dockets, while encouraging a disregard of the rule of law by creating an incentive for INS to deport aliens summarily before they can seek judicial review.

On the other hand, by reading the term "depart" in Section 106(c) to include only voluntary departures (and not forced or mandatory deportations), aliens who receive final deportation orders have time to consider whether they have a basis for appeal—just as Congress intended. See H.R. Rep. No. 1086, reprinted in 1961 U.S.C.C.A.N. at 2973-74 (noting that time periods in Section 106(a) were designed to allow the alien sufficient time to "ponder[] the propriety of the deportation order against him" and "to determine whether he really has a case upon which he should seek judicial review and to prepare therefor"). Allowing judicial review to take place without regard to whether the petitioner has been denied a stay and deported can accomplish a reasonable goal consistent with both due process and law enforcement interests.[16]

This is particularly true when one considers the recent amendments to Section 106. It is uniformly accepted that these amendments were enacted as an expression of Congress' intent that criminal aliens not prolong their stays in the United States on account of statutory provisions for judicial review.[17] Notably, Congress did not restrict

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[16] Notably, countries that allow appeals after departure, including Great Britain where aliens who are subject to deportation orders can appeal *only* after they depart, have found that such a rule works smoothly. See Martin, *Mandel, Cheng Fan Kwok, and Other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 VA. INT'L L.J. 803, 816-819 (1987), quoted in T. Alenikoff & D. Martin, *Immigration: Process and Policy* 933 (2d ed. 1991).

[17] There now exist three situations under Section 106(a)(3) in which a petition for review does not automatically stay execution of a deportation order, including cases where the court otherwise directs that there be no

or amend the right of judicial review to any class of deportable alien, including criminal aliens. Instead, Congress shortened the time in which to take an appeal and left it to the discretion of the courts of appeals as to whether such aliens should be granted stays of deportation pending review. As presently read by the court of appeals in this case, however, aliens would lose all judicial recourse for due process violations caused by illegal INS action (should a court of appeals deny a discretionary stay).

Amici propose that the reading urged by petitioner gives far more reasonable effect to these amendments than an interpretation which would allow INS to extinguish the continuing right to judicial review by invoking Section 106(a)(3) simply because it concluded that the alien's presence was not desirable and that involuntary deportation was preferable to judicial review. If the statute is read as Petitioner suggests, however, the quantity of review petitions not only would be likely to decrease, but their quality might well increase as aliens and their counsel would be given the full opportunity to consider the merits of seeking judicial review. Likewise, it would serve to eliminate the incentive for the INS to engage in sorts of tactical behavior that now permeate its efforts to deport aliens as quickly as possible. Finally, such a conclusion would more fairly balance and realize he dual interest in due process and effective enforcement of the law.

In any event, it is a certainty that the issues presented for review in this case will continue to recur frequently unless and until this Court resolves this these issues once and for all. *Amici* respectfully urge this Court to accept the opportunity to do so in this case.

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automatic stay, or those involving aliens convicted of an aggravated felony (including those for whom proceedings have been conducted under §242A(b), as amended September 13, 1994). In those instances, the statute mandates there be no stay upon the filing of a petition for review unless the court otherwise directs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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